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No. 85-1194

In the Supreme Court of the United States

OCTOBER TERM, 1985

STEVEN F. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

QUESTIONS PRESENTED

1. Whether the district court imposed an unconstitutional burden on an attorney's First Amendment right to the free exercise of religion by holding him in contempt for failure to appear at scheduled dates of trial after it denied his motion, made on the first day of trial, to adjourn the trial for four full days to allow for his observance of Passover.

2. Whether, in the circumstances of this case, the district court's finding of summary contempt under Fed. R. Crim. P. 42(a) denied petitioner his due process right to notice and an opportunity for a hearing.

3. Whether the evidence of criminal intent was sufficient.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Falstaff Brewing Corp. v. *Miller Brewing Co.*, 702 F.2d 770	9
Goldman v. *Weinberger*, No. 84-1097 (Mar. 25, 1986)	6
Groppi v. *Leslie*, 404 U.S. 496	9
Morris v. *Slappy*, 461 U.S. 1	8
Thomas v. *Review Board*, 450 U.S. 707	7
United States v. *Onu*, 730 F.2d 253, cert. denied, No. 84-124 (Oct. 1, 1984)	8
United States v. *Rylander*, 714 F.2d 996, cert. denied, No. 83-906 (May 21, 1984)	9
United States v. *Wilson*, 421 U.S. 309	8

Constitution and rule:

U.S. Const. Amend. I	3, 6, 8
Fed. R. Crim. P.:	
Rule 42(a)	8
Rule 42(b)	4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-59a) is reported at 770 F.2d 1550. The opinion of the district court (Pet. App. 1a-25a) is reported at 592 F. Supp. 149.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1985. The petition for a writ of certiorari was filed on November 18, 1985, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an attorney, was found guilty of criminal contempt by the United States District Court for the Southern District of Florida after he stated that he would not obey a court order and then failed to appear to represent his client. Petitioner was fined $1,000. The court of appeals affirmed (Pet. App. 25a-59a).

1. The facts, which are not in dispute, are summarized in the opinions of the court of appeals and the district court. Petitioner was the attorney for one of nine co-defendants in a federal criminal prosecution based on a 35-count indictment. On February 27, 1984, when the district court held a calendar call to set the trial date, the parties estimated that the trial would last approximately three to four weeks. The court asked the attorneys whether any of them had any conflicts in their schedules or preplanned vacations during the months of April and May. Petitioner responded that he did not have a vacation planned, but that he did have a trial scheduled for the first week in April. Petitioner further stated that he had no objection to any other time during April and May. The trial then was set to begin on Monday, April 16. Pet. App. 5a-6a, 29a-30a.

On Thursday, April 12, petitioner's brother, Jeffrey Jackson, appeared at a pretrial hearing in place of petitioner. Jeffrey Jackson informed the court that petitioner was ready for trial but would be unavailable on Tuesday and Wednesday of the next week (April 17 and 18) and Monday and Tuesday of the following week (April 23 and 24) because of his observance of Passover. The judge responded that he had never had a request for whole days off for Passover, but that he always recessed the court sufficiently

early in the day to accommodate those intending to celebrate Passover. Pet. App. 7a, 30a.

On Monday, April 16, the day on which the trial was scheduled to begin, petitioner for the first time filed a written motion requesting that proceedings be stayed on the next two days and on Monday and Tuesday of the following week. Petitioner based his motion on the First Amendment, explaining that he is an observant Jew, that the first and last two days of Passover are important Jewish holy days, and that it had always been his custom to follow the Jewish law that no work could be done on those days. The court denied the motion, stating that a nine-defendant trial that was expected to last between three and four weeks could not be rescheduled at that late date. Petitioner then informed the court that he would not be present on the four days in question. Pet. App. 8a-10a, 31a-32a.

Throughout the rest of that day, the court explored alternative ways of resolving the problem, such as substituting another lawyer for petitioner on the days involved or having a transcript of the missed testimony provided for petitioner. However, these suggestions were unacceptable to petitioner's client, and the court's offer to recess anytime during the day for religious services was rejected by petitioner, who insisted that he could not work at all on the days in question. The court specifically ordered petitioner to be present in court on the following day or be subject to contempt and criminal sanctions. When the court adjourned on Monday, April 16 at 4:00 p.m., it again urged petitioner to be present the following day or be in defiance of a court order. Petitioner informed the court that he would not be present. Petitioner did not appear the following day or on the other three

days in question, but the court was able to obtain the services of a local attorney, Jeffrey Miller, to represent petitioner's client, Jones. Pet. App. 10a-11a, 13a, 32a-34a.*

When petitioner did not appear on Tuesday, April 17, the court found that he had committed contempt twice on the previous day by stating that he would not obey the court's order to appear. The court issued a certificate of contempt, which stated that the issue presented concerned not petitioner's right to practice his religion, but the duty of an attorney to advise the court of scheduling conflicts well in advance. In this case, the court emphasized, petitioner had actually assured the court when the trial date was set that he had no vacation plans or conflicting obligations. The court then set a hearing on the matter for April 19. Pet. App. 20a, 34a-35a.

At the hearing, petitioner, through counsel, argued that he had not been afforded an opportunity to be heard pursuant to Fed. R. Crim. P. 42(b), and that he lacked the requisite intent to support a finding

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* When Jackson did not appear on Tuesday, April 17, defendant Jones stated to the court (Pet. App. 43a-44a n.9):

> Your Honor, I was embarrassed about what happened yesterday. My attorney, Mr. Jackson, did not confer with me on the motion he made about this holiday. I had no idea what he was doing. I am real anxious to get this over with and go on to trial. I don't know too much about the law but realize my life's at stake and I'm worried and I'm scared.
>
> Yesterday you recommended I speak to a few attorneys about representation so I have spoken to several. I don't have enough money, I can't afford to get another one and at that late hour, most didn't want to get involved. I need another attorney. I'd like to get another attorney. I am in your hands, Your Honor.

of criminal contempt. *Petitioner's attorney proffered* evidence of the importance of the days in question to observant Jews. However, the court declined to receive the testimony of two rabbis on this question, explaining that the evidence was irrelevant because the court did not question the sincerity of petitioner's religious beliefs. Petitioner then testified, admitting that Passover occurred every year in March or April and that he had perhaps been tardy in informing the court of his need to be absent. But petitioner stated that he had never before been denied a request for a continuance for religious holidays. The court stated that it would have been a simple matter to rearrange its calender if petitioner had filed his motion when he should have, but that his failure to do so was an irresponsible omission as a lawyer. The court then fined petitioner $1,000. Pet. App. 35a-37a.

2. The court of appeals affirmed (Pet. App. 25a-59a). It concluded that in the circumstances of this case, summary contempt was appropriate because the reasons for petitioner's absence had already been thoroughly explained to the court, making it unnecessary to provide another opportunity for petitioner to explain why he had not been present (*id.* at 47a-49a). The court further found that petitioner's absence created a significant disturbance and delay in the trial proceedings, causing considerable inconvenience to the jurors, defendants, and other attorneys, as well as expense to the public. In the court of appeals' view, these consequences warranted summary contempt. *Id.* at 42a-47a. The court of appeals also agreed with the district court that evidence of the religious importance of petitioner's absence was irrelevant, because the finding of contempt did not stem from petitioner's exercise of his religious beliefs but

rather from his failure to give the district court adequate notice of his inability to appear. In the court of appeals' view, petitioner had a duty to inform the court sufficiently before trial in order to assert his First Amendment rights. *Id.* at 55a. Because there was no indication that the district court would have refused to accommodate a timely request by petitioner for a continuance based on religious grounds, the court of appeals found no First Amendment violation (*id.* at 55a-58a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 10-24) that the district court's order holding him in contempt for failing to appear imposed an unconstitutional burden on his First Amendment right to the free exercise of his religion. Unlike the cases cited by petitioner (Pet. 12-18), however, this case does not present a situation in which the government imposed a restriction that directly affected a person's religious practices. Compare *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986). To the contrary, the district court explained to petitioner that it would have been quite willing to adjust its schedule to allow for his observance of Passover (Pet. App. 36a-37a). Indeed, the record establishes that the court was prepared to adjust the trial schedule for *any* planned vacations or other commitments, and the court intended, as was its custom, to adjourn for the observance of Passover (*id.* at 6a-8a). Yet when the trial date was set, petitioner specifically informed the court that he had no

objection to scheduling the trial during April or May (*id.* at 5a-6a, 29a-30a).

Petitioner was held in contempt not because of his religious observance, but because he had failed to notify the court until immediately before the trial that he would not be present for four of the first seven days of the trial. Petitioner's unavailability was not due to circumstances unanticipated by him; he informed the district court that it had been his practice since childhood to follow Jewish law that no work may be done on those days (Pet. App. 31a). The district judge remarked that he had never had a request to adjourn for four full days at Passover, and he understandably was taken by surprise by petitioner's motion to this effect, filed only as the trial was beginning (*id.* at 7a, 9a, 20a, 36a-37a). At that point it was impossible to accommodate petitioner without seriously disrupting a trial that involved numerous other parties. In fact, petitioner concedes in this Court that his request for a stay of proceedings "was made late in the day" (Pet. 20); that he "certainly recognized that his request might cause some inconvenience" (*ibid.*); and that "[i]t is certainly true that had [he] given more notice to the judge it is possible that there would have been an accom[m]odation" (Pet. 21).

Thus, in the circumstances of this case, it was petitioner's own neglect of his responsibilities as an officer of the court and attorney for his client, not the court's action, that was the cause of the conflict between petitioner's religious obligations and the government's need to proceed with its carefully scheduled functions. Compare *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Petitioner properly may be held responsible for the consequences of that conduct.

The courts below therefore correctly held that this case does not present a question of the refusal by the government to accommodate a person's First Amendment right to the free exercise of religion, because petitioner failed to afford the court a genuine opportunity to accommodate that right (Pet. App. 20a, 55a-58a). Cf. *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *United States* v. *Onu*, 730 F.2d 253 (5th Cir. 1984), cert. denied, No. 84-124 (Oct. 1, 1984). Moreover, by the time petitioner *did* request a stay, the governmental interest in avoiding disruption of the efficient administration of justice had plainly taken on sufficient importance to justify the indirect impact on petitioner's First Amendment right occasioned by the contempt sanction. See *Thomas* v. *Review Board*, 450 U.S. at 718-719.

2. Petitioner further maintains (Pet. 25-29) that the district court's finding of summary contempt, without a prior hearing, deprived him of an opportunity to be heard. This claim is without merit.

The court of appeals correctly found this case to be similar to *United States* v. *Wilson*, 421 U.S. 309 (1975), in which summary contempt under Fed. R. Crim. P. 42(a) was held to be appropriate for the refusal of a witness to testify at trial despite a grant of immunity. Just as in *Wilson*, this case involved an ongoing trial that was brought to a halt by the conduct in question. Indeed, as the court of appeals observed, the disruption of the proceedings in this case was even more serious than in *Wilson* because of the number of people affected and the inevitable complications involved in any attempt to delay or reschedule the trial (Pet. App. 44a-47a).

The court of appeals recognized that a failure to appear is not normally punishable by summary con-

tempt. This is because a prior hearing is usually necessary for the court to learn the reasons for the person's conduct (Pet. App. 48a). In this case, petitioner already had fully explained his reasons for not being present and stated his clear intention not to obey the court's order to appear. Furthermore, a hearing subsequently was held, and petitioner was given an opportunity at that hearing to explain his absence by offering "any exculpatory, mitigating or extenuating reasons" (*id.* at 20a). As the court of appeals observed, the district court obviously had reserved the possibility of modifying its action (*id.* at 49a n.11). See *Groppi* v. *Leslie*, 404 U.S. 496, 506 n.11 (1972). In these circumstances, the court of appeals correctly held that the finding of summary contempt satisfied the requirements of due process.

3. Finally, petitioner contends (Pet. 30-33) that there was no evidence of criminal intent because, in his view, the mere refusal to obey a court order, without evidence of a bad motive, is insufficient to prove contempt. This argument is insubstantial. As the court of appeals held, the essential elements of criminal contempt are knowledge of the order and a willful disobedience of it. *Falstaff Brewing Corp.* v. *Miller Brewing Co.*, 702 F.2d 770, 782 (9th Cir. 1983); *United States* v. *Rylander*, 714 F.2d 996, 1001-1002 (9th Cir. 1983), cert. denied, No. 83-906 (May 21, 1984). Willfulness in this context means simply an intentional or deliberate violation, as distinguished from accidental or negligent conduct. *Falstaff Brewing Corp.* v. *Miller Brewing Co.*, *supra*. Petitioner concedes that "without question the subject order was clear and definite and was understood by the Petitioner" (Pet. 19). Nothing more is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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